the plaintiff herein has suffered one fracture less than the plaintiff in either of those cases. Having regard to the above, I think a sum of $18,000.00 would be fair and reasonable.

For the fracture of the right mandible, Mr. Ting suggests a figure of $7,500.00 on the authorities of *M. Alagappan, s/o Muthuraman* v. *The Government of the Republic of Singapore*[6] ($7,000.00) and *Yasin bin Wahab* v. *Loo Kok Wai*[7]. In the case of *M. Alagappan* (*supra*), the fracture of the mandible was treated with wire fixation and there was no residual disability as far as the jaw was concerened. In the *Yasin* case (*supra*), the fracture of the mandible had united soundly, but there was a residual disability, in that the plaintiff there suffered discomfort on side to side movement of the mandible. In the present case, it is difficult to determine the seriousness of the fracture of the mandible, owing to the absence of evidence relating to its treatment. From the plaintiff's evidence, it would not be unreasonable to deduce that it took a much shorter period to heal than in the *Yasin* case (*supra*). Although medical evidence shows that the fractured mandible has healed well with no sign of any residual disability, the plaintiff complains that she feels uncomfortable in her mouth when biting solid food. Under the circumstances, I think an assessment of $6,000.00 would be fair and reasonable.

As regards the liver laceration, a figure of $6,000.00 is suggested by Mr. Ting on the authority of *Muslim bin Arip* v. *Gue Kee Peng*.[8] There is no doubt that this case is more serious than the present case, in that the outer aspect of the right lobe of the liver was pulverised and the damaged portion thereof was removed. In the present case, the liver was lacerated causing bleeding from an artery, but this was sutured at laparotomy. The liver laceration has healed with no side effect, except for the 5" laparotomy scar on the upper mid abdomen, which obviously will not in any way affect the plaintiff's outward appearance. In the light of these factors and having regard to the case of *Siow Choo Foo* v. *Lee Peng Lay & Anor.*[9] I am of the view that $5,000.00 would be a fair and reasonable assessment.

From the above assessment of all these five injuries, a total sum of $33,500 is arrived at. However, there is, undoubtedly, considerable overlapping in this case, since all these injuries were suffered in the same accident. A sum of $8,500.00 should therefore be deducted for overlapping, leaving a balance of $25,000.00 which, I think, is fair and reasonable in the circumstances.

Accordingly, judgment is given for the plaintiff in the sum of $25,000.00 as general damages, with interest at the rate of 6% per annum from the date of the service of the Writ to the date of judgment, and $92.00 as special damages with interest at the rate of 3% per annum from date of accident to the date hereof, and further statutory interest on general and special damages at the rate of 8% per annum from date of judgment to the date of payment, and costs.

Claim allowed.

Solicitors: *Yong & Wong; Battenberg & Talma.*

MANANG SELAMAN AK. NYALAU v. MANANG LIM NATIVE SDN. BHD.

[O.C.J. (Chong Yik Liong J.) February 7, April 4 & 22, June 13 & July 24, 1984]

[Kuching – Originating Motion No. KG 16 of 1982]

Land Law – Caveat – Entry and removal – Applicant a non-native – Whether agreement and trust deed valid – Whether interest in land – Whether caveat could be removed – Land Code (Sarawak Cap. 81), ss. 8, 9(1)(d) & 177(1) – Interpretation Ordinance (Sarawak Cap. 1).

In this case, the respondent company, not being a native, lodged a caveat against a piece of land comprised in Kuching Lease of Crown Land No. 5352 of 1952 ("the said land") based on an agreement entered into between the respondent and the applicant and a trust deed executed by the applicant, registered proprietor of the said land. The applicant applied to the Court under section 177(1) of the Land Code (Sarawak Cap. 81) for the removal of the caveat.

Held: (1) on the law as it now stands, there is no way in which the respondent can acquire the status of a native, and being an artificial person, the respondent is not, and can never be, a native within the meaning of the Land Code read in conjunction with the Interpretation Ordinance;

(2) the agreement and the trust deed are illegal as being made in contravention of the provisions of section 8 of the Land Code in that they relate to a dealing prohibited by law, and are therefore void and unenforceable;

(3) the respondent having no valid claim to an interest in the said land, the caveat must be removed, with costs to the applicant.

[*Editorial Note:* The respondent's appeal to the Supreme Court was dismissed in S.C.C.A. No. 210 of 1984. The Supreme Court Judgment will be reported in the next issue.]

Case referred to:

(1) *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.* [1916-17] All E.R. Rep. 191.

ORIGINATING MOTION.

James King for the applicant.
Miss S. Y. Chan for the respondent.

Cur. Adv. Vult.

Chong Yik Liong J.: By this notice of originating motion, the applicant who is the registered proprietor of a piece of land situate at Bintawa, Kuching, Sarawak, containing an area of 5.84 acres, more or less, and comprised in Kuching Lease of Crown Land No. 5352 of 1952 (hereinafter referred to as "the said land") applies to the Court under section 177(1) of the Land Code (Cap. 81) of Sarawak for the removal of a caveat lodged by the respondent against the said land and registered as Instrument No. L. 8916/1974 at the Kuching Land Registry Office. The application is supported by two affidavits, one by the applicant himself affirmed on November 1, 1982 and the other by James King affirmed on February 4, 1983, but is resisted by the respondent who has filed in an affidavit in opposition by Hsu Meng Khiang, the secretary of the respondent, affirmed on March 16, 1983.

The respondent is a limited company incorporated on February 12, 1973 under the Companies Act, 1965 and having its registered office at 228, Jalan Satok, Kuching, with an authorised share capital of $1 million, divided into 100 shares of $10,000 each, of which 50 shares have been issued, and of these issued shares 27 are held by three native shareholders. The respondent lodged a caveat against the said land under section 173 of the Land Code by virtue of two documents upon which the respondent based its claim to a caveatable interest in the said land. The 1st document is an agreement dated February 4, 1974 and entered into between the applicant and the respondent in respect of three parcels of land (of which the said land is one), which are stated to have been acquired by the applicant in the name, for and on behalf and for the benefit of the respondent. By this agreement it was, *inter alia,* provided that the respondent would repay to the applicant the sum of $168,000, being the total acquisition price of the said land and another piece described as Lot 4412 Muara Tebas Land District, to be credited in the respondent's books and satisfied by the issue of shares of the respondent to the applicant, upon the condition that the applicant would, as soon as possible, make and execute a declaration of trust in respect of these two pieces of land in favour of the respondent upon the trusts therein specified. The 2nd document is a trust deed which was executed by the applicant on February 4, 1974 and was expressed to be supplemental to the agreement hereinbefore referred to. By the trust deed, the applicant declared that he held the said two pieces of land (of which the said land is one) in trust for the respondent upon trusts that he would not dispose of or deal with the same, except under the direction or specific instruction of the respondent, and that he would also pay to the respondent all moneys received from the sale thereof.

It is common ground that the said land to which the agreement and the trust deed relate is a Native Area Land as defined by the Land Code. Thus, learned counsel for the applicant submits that the respondent, not being a native of Sarawak, can acquire no interest whatsoever in the said land by virtue of the said two documents which are illegal as being made in contravention of section 8 of the Land Code, unless the respondent can bring itself within the exception provided in section 9(1)(d) of the same Code.

Section 8 of the Land Code, *inter alia,* provides as follows:

> "8. Save as provided in section 9 –
>
> (a) a person who is not a native of Sarawak may not acquire any rights or privileges whatever over any Native Area Land, Native Customary Land or Interior Area Land;
>
> (b) any agreement, purporting to transfer or confer any such rights or privileges or which would result in such person enjoying any such right or privilege, shall be deemed to have been entered into for an illegal consideration; and, in particular ..., any consideration which shall have been paid or furnished shall not be recoverable in any court nor shall any relief be afforded to any person claiming that any consideration promised has not been paid or furnished.
>
> ...
>
> (c) ... the rights and privileges of any native shall not be adversely affected by any agreement to which paragraph (b) applies;"

And section 9 of the same Code, amongst other things, reads as follows:

> "9. (1) Section 8 shall not be deemed to prohibit the

acquisition by any non-native of any land to which the provisions of that section apply, or of any rights or interest in or over such land

...

(d) under or by virtue of a dealing executed by the registered proprietor of Native Area Land in favour of such person as may be authorised by a general or special direction of the Yang di-Pertua Negeri in Council, and in any such case that person shall, for all purposes of this Code relating to the dealing, be deemed to be a native;"

From the statutory provisions above quoted, it is clear that, in Sarawak, a non-native cannot, without the authorisation of the Yang di-Pertua Negeri in Council, acquire or deal with any Native Area Land or any rights or interest therein, and any agreement relating to such acquisition or dealing by a non-native is illegal and, therefore, null and void, and unenforceable in any court of law, but without prejudice to the rights or privileges of the native over such land.

In the light of the above, it is evident that, in the instant case, the validity of the respondent's claim to a caveatable interest in the said land depends on the legality of the two documents above referred to, and this in turn depends on whether the respondent is a native or, if the respondent is not a native, whether it is authorised under section 9(1)(d) of the Land Code to acquire or deal with the interest which the said two documents purport to create in the said land in favour of the respondent.

It appears implicit in the submission of learned counsel for the respondent that the respondent is not a native as defined by the Interpretation Ordinance (Cap. 1) of Sarawak, but he contends that the statutory definition of "native", being in reference to a natural person, cannot be applied to a company or corporation such as the respondent which is an artificial person, and upon this premise, he ventures a submission to the effect that the racial character of the company should be determined by or in accordance with the race of the majority shareholders who have the control over it: that is to say, if the majority shareholders who control the company are of a particular race, then the company will assume the character or personality of that particular race. The respondent's argument is essentially grounded upon an analogy of several English cases to which the Court is referred and of which I need only mention one, namely: *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.*[1] of which the headnotes, *inter alia,* read as follows:

"A company incorporated in the United Kingdom may assume an enemy character if its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of the enemy, but the character of individual shareholders cannot of itself affect the character of the company, and a company does not assume an enemy character because its shareholders are wholly or largely alien enemies. The enemy character of individual shareholders and their conduct may, however, be very material on the question whether the company's agents, or the persons in *de facto* control of its affairs are in fact adhering to, taking instructions from, or acting under the control of, enemies. This materiality will vary with the number of shareholders who are enemies and the value of their holdings ..."

By this submission the Court is in effect invited in this case to say that the respondent is a native, since the majority shareholders who control it are natives within the meaning of the Interpretation Ordinance, so that the said two documents will not be rendered illegal, and that the respondent is, therefore, entitled to the interest thereby created in the said land, so as to entitle it to maintain the caveat lodged against the said land.

With respect, I am unable to accept the respondent's proposition. I do not think that the test laid down by the House of Lords in *Daimler's* case (*supra*) can be analogy be applied to the present case for determining the racial character of the respondent, a company incorporated under the laws of this country. It is pertinent to note that the *Daimler* case (*supra*) was decided in the context of the laws against trading with the enemy where there was a provision not only for defining the term "enemy" but also for attaching enemy character to incorporated companies, and it was there said that for that purpose, it was not contrary to principle for the court to look behind the corporation and consider the quality of its shareholders for, as Lord Parker said (at page 205):

"... if that character must be derivable, not from the circumstances of its incorporation, which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace and war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officer has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators ..."

However, no provision is made in our law for attaching racial or native character to companies incorporated in this country. In the absence of any such statutory provision, it is, in my view, not permissible for the Court in this case to look be-

hind the corporate veil of the respondent and identify the respondent with the race of its majority shareholders by whom it is controlled, so as to give it a native character because they have that character, or to make it a native because they are natives. On the law as it now stands, there is no way in which the respondent can acquire the status of a native, and being an artificial person, the respondent is not, and can never be, a native within the meaning of the Land Code read in conjunction with the Interpretation Ordinance.

With the conclusion arrived at above, I now come to the question whether the respondent is authorised by the Yang di-Pertua Negeri in Council to acquire or deal with the said land, or the interest therein, under section 9(1)(d) of the Land Code. My answer to this is simply in the negative, there being no evidence whatsoever before the Court to show that such authorisation has been given.

In the event, I hold that the two documents, namely: the agreement and the trust deed above referred to, are illegal as being made in contravention of the provisions of section 8 of the Land Code, in that they relate to a dealing which is prohibited by law, and are, therefore, void and unenforceable. Consequently, the respondent can have no valid claim to an interest in the said land under or by virtue of the said two documents or either of them, such as would entitle it to maintain the caveat lodged by it against the said land.

For the reasons which I have stated above, I would allow this application and accordingly make the order as prayed in the notice of originating motion with costs in favour of the applicant.

Application allowed.

Solicitors: *Loke, King & Co.; Ee & Lim.*

MILLION GROUP CREDIT SDN. BHD. v. LEE SHOO KHOON & ORS.

[O.C.J. (Shankar J.) December 29, 1984]

[Johor Bahru – Originating Summons No. 758 of 1984]

Land Law – Caveat – Ex parte application for extension of private caveat.

Contract – Draft agreement for sale and purchase of land – Draft duly signed by appellant and forwarded together with 10% deposit of purchase price to the respondents – Respondents declined to sign the Agreement and returned the deposit – Effect of.

Conveyancing – Agreement for sale and purchase of land – 10% deposit of purchase price – Dispute as to provisions of agreement – Caveat – Application for extension of private caveat – Caveator had no interest in land – Court ordering removal of caveat.

Legal Profession – Practice and Etiquette – Legal Profession (Practice and Etiquette) Rules 1978, r. 28.

In this case the respondents through their solicitor offered to sell the land in question on certain terms. The applicant made a counter-offer to purchase the said property on certain terms and the counter-offer was addressed to the respondents' solicitor. The terms of the agreement were discussed and it was agreed that one of the clauses in the written Sales Agreement should be deleted. The draft agreement was then engrossed and the applicant's solicitor forwarded six copies of the draft to the solicitor of the respondents with a request that the same be executed. The agreement by then had been signed by the applicant and the covering letter enclosing the engrossed copies of the agreement was accompanied with a cheque for 10% of the purchase price. The said covering letter stipulated that the cheque was not to be released to the respondents unless they have signed the agreement of sale and the memorandum of transfer, and deposited the title deed with the respondents' solicitor.

Three months later the respondents' solicitor advised the applicant's solicitor that his clients were unable to agree on certain terms and conditions contained in the written agreement and consequently the applicant's cheque for 10% of the purchase price was returned uncashed. Arising from this the applicant filed a caveat against the land. Some seven months later the respondents filed a notice addressed to the applicant to show cause why the caveat should not be removed. In response to this notice the applicant filed an *ex parte* application for the extension of the private caveat.

Held, dismissing the application: (1) a mere chose in action arising out of or incidental to a contract for the sale of land could not entitle the claimant to lodge a caveat to freeze the land until his action had been heard. He must have "an interest in the land";

(2) merely because the respondents' solicitor agreed to a deletion of one clause in a draft did not entitle the applicant's solicitor to say that by doing so he must be taken, on behalf of his clients, to have agreed to all the terms in the contract so that the execution of the document became a mere formality;

(3) this was not a case where the caveator had satisfied the court on the evidence presented that he had a claim to an interest in the land or that such a claim raised a serious question to be tried;

(4) in the circumstances of the case this was not a proper case for the extension of the caveat and it should therefore be removed.

Obiter: The practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to con-